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No. 87-633

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

APEX OIL COMPANY,

*Petitioner*,

—against—

JOSEPH DiMAURO, et al.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT JULIAN RABER

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court invoke its certiorari jurisdiction to determine whether a unanimous court of appeals panel erred in affirming the district court's determination that there was no evidence that Respondent Julian Raber acted in bad faith—the admittedly applicable standard of liability under the Commodity Exchange Act?

2. Should this Court invoke its certiorari jurisdiction to determine whether a unanimous court of appeals panel erroneously applied the rule of *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 547, 106 S.Ct. 1348 (1986), in determining that Petitioner had failed, on a motion for summary judgment in an antitrust conspiracy case, to adduce "evidence that tends to exclude the possibility" that Respondents acted independently?

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ON PETITION FOR A WRIT OF CERTIORARI
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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT JULIAN RABER

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### SUMMARY OF ARGUMENT

This Petition does not involve any "special and important" issue meriting review by this Court. Neither of the questions raised involves a conflict between circuits or an important question of federal law requiring settlement by this Court. Supreme Court Rule 17.1.

(1) The standard of liability under the Commodity Exchange Act for a commodity futures exchange officer applied by the court of appeals—requiring plaintiff to prove that self-interest or another ulterior motive was the sole or dominant reason for the officer's conduct—is the universally applied

standard for judging such conduct. Contrary to the Petition's suggestion, there is no conflict among the circuits on the issue.

(2) The district court, in entering summary judgment for Respondent Julian Raber on Petitioner's antitrust conspiracy claim, and the court of appeals, in affirming that judgment, correctly applied the standard set forth in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986), finding no evidence in the record that "tends to exclude the possibility" that Respondent acted independently.

The opinion of the Court of Appeals for the Second Circuit is reported at 822 F.2d 246. The opinion of the district court is reported at 641 F. Supp. 1246.

## STATEMENT OF THE CASE

This action arose because Apex chose not to liquidate its 4,378 short February 1982 No. 2 heating oil futures contracts, thereby obligating itself to deliver approximately 184 million gallons of heating oil on the New York Mercantile Exchange,[1] but was not in a position to deliver in accordance with the Exchange's rules. (Pet. App. at A-43.)[2]

The Exchange is a market on which its clearing members enter into contracts to make ("short") or take ("long") future delivery of various commodities. The Exchange is a self-regulatory body. It adopts rules establishing the terms of

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1 Hereinafter "the Exchange". Respondent Julian Raber ("Raber") was Vice-Chairman of the Exchange during the pertinent time period in 1982. The Exchange and Raber are collectively referred to as the "Exchange Respondents."

2 The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari and "Pet. App." for citation to the Appendix to the Petition.

contracts traded on the Exchange. Commodity Exchange Act ("CEA") § 5a(12), 7 U.S.C. § 7a(12) (1982); 17 C.F.R. § 1.41.

The Exchange, in turn, is closely regulated by the Commodity Futures Trading Commission ("CFTC"), which must approve all contract and trading rules. CEA § 5a(12), 7 U.S.C. § 7a(12) (1982). The Exchange may not enforce rules which have not been approved; once approved, the Exchange must enforce and may not revoke rules. CEA § 5a(8) and (12), 7 U.S.C. § 7a(8) and (12) (1982); 17 C.F.R. § 1.53.

In 1982, Raber was the Vice Chairman of the Exchange, and during the first week of February 1982 (the time period at issue here) served as acting chairman of the Exchange's control committee, which monitored delivery of the February 1982 heating oil contracts.

Apex's complaint, alleging violations of the Commodity Exchange Act and the Sherman Act, is that the Exchange and Raber refused to help it out of its predicament in February 1982 by declining to take emergency action. Apex contends that the Exchange should have altered its delivery rules to permit Apex to deliver, as its amended complaint put it, "reasonably over the course of the delivery month," rather than in accordance with Exchange rules.

The Exchange Respondents were confronted by a trader who had no oil at the facility Apex had designated for delivery (Pet. App. at A-43) and who made false representations concerning the amount of oil it had (and would have) there. (Pet. App. at A-50.) Instead of changing the rules, the Exchange and Raber "jawboned" clearing members representing the longs (who take delivery) and the short (who makes delivery). (Pet. App. at A-33; A-103.) They met with representatives of Apex and the longs (Pet. App. at A-12; A-50), urged flexibility, and discussed ways of resolving the delivery problem. They enforced the rules and reminded Goldman Sachs & Co., the short clearing member acting for Apex, of the penalties for delinquency and default in the event of a failure to deliver. As a result of their efforts, there was no default. (Pet. App. at A-13; A-51.) The

Exchange enforced its rules. Apex, which had no oil, bought a sufficient supply, and the delivery problem was resolved. (Pet. App. at A-13.)

The district court, in a detailed and careful opinion, ruled that there was no evidence of bad faith or of participation by the Exchange or Raber in any conspiracy and granted summary judgment dismissing all claims against them. (Pet. App. at A-96; A-108.) The court of appeals unanimously affirmed, stating that:

> "Apex failed to present evidence tending to show that the Exchange [or Raber] acted or failed to act as a result of self-interest or bad faith as interpreted in a number of this court's decisions." (Pet. App. at A-35.)

The Second Circuit adopted the district court's findings on its dismissal of the Commodity Exchange Act claim and affirmed the district court on its dismissal of the Sherman Act claim, reasoning that the evidence demonstrated good faith " 'jawboning' in an attempt to avert an impending default" and that "Apex has offered no plausible motivation" for the Exchange Respondents' participation in the scheme. (Pet. App. at A-32 to A-33.)

For a complete statement of the case, the Court is referred to the decision of the Court of Appeals for the Second Circuit (Pet. App. at A-7 to A-13) and the decision of the district court. (Pet. App. at A-42 to A-51.)

## REASONS FOR DENYING THE WRIT

### I.

### THE COMMODITY EXCHANGE ACT ISSUE DOES NOT WARRANT REVIEW BY THIS COURT

Petitioner concedes that to prevail on its Commodity Exchange Act claims against the Exchange Respondents, it must establish that they acted in bad faith (Pet. at 16-17); and in a desperate effort to create an issue worthy of review by this Court, it suggests that the circuits are in conflict concerning the standard to be applied in determining that question. There is no such conflict. The Second Circuit correctly applied the applicable bad faith standard to the facts before it in affirming summary judgment for the Exchange Respondents. There is thus no question meriting review by this Court. *See* Supreme Court Rule 17.1.

#### A. There Is No Conflict Among The Circuits

The two courts of appeals which have addressed the question agree that bad faith is a necessary element of all claims under the Commodity Exchange Act challenging the regulatory conduct of commodity exchanges designated as "contract markets" by the Commodity Futures Trading Commission. A claim will not lie against an exchange or one of its officials unless "self-interest or other ulterior motives unrelated to proper regulatory concerns" is the "sole or the dominant reason" for the action or inaction in question. *Sam Wong & Son, Inc.* v. *New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984); *Ryder Energy Distribution Corp.* v. *Merrill Lynch Commodities Inc.*, 748 F.2d 774 (2d Cir. 1984). *Accord*, *Daniel* v. *Board of Trade*, 164 F.2d 815 (7th Cir. 1947); *Lagorio* v. *Board of Trade*, 529 F.2d 1290 (7th Cir.), *cert. denied*, 426 U.S. 950 (1976). In *Ryder Energy*, the Second Circuit stated the rule concisely:

> "A claim of bad faith must be supported by two allegations: first, that the exchange acted or failed to act with

knowledge; *and second, that the exchange's action or inaction was the result of an ulterior motive*." *Ryder Energy*, *supra*, 748 F.2d at 780, emphasis added.

Apex urges this Court to ignore the second part of this accepted test and suggests that bad faith may be established "where an exchange knows of a manipulation but fails to take any action to prevent it." (Pet. at 15.)[3] It goes on to suggest that "the federal courts are in conflict" as to the meaning of the bad faith standard. (Pet. at 14.) Apex supports this proposition with a series of district court decisions, all of which pre-date the Second Circuit's opinions in *Sam Wong* and *Ryder Energy*;[4] an inapposite Second Circuit case decided forty years before these decisions; and two Seventh Circuit opinions, both of which are also inapposite. (Pet. at 19, nn. 14, 13, 12.) None of those decisions conflicts with the Second Circuit's decision here. The Petition therefore does not "call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a).

The two Seventh Circuit decisions are not in conflict with the Second Circuit's bad faith standard. *Deaktor* v. *L.D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), does not even address the standard of liability. "The sole issue in [that case was] whether the district court could take jurisdiction of

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3 This plainly disregards the Second Circuit's *Sam Wong* opinion which makes it clear that the "ulterior motive" standard applies both to exchange actions and to alleged exchange inaction: "[A] plaintiff . . . [will] have the initial burden of showing that ulterior motive, *e.g.*, financial gain or personal animosity, was 'a substantial or motivating factor' in the *taking of or failure to take action*." *Sam Wong*, *supra*, 735 F.2d at 677, emphasis added, citations omitted. *See also*, *Ryder Energy*, *supra*, 748 F.2d at 780 ("we have recently made it clear that the bad faith requirement governs claims of both exchange action and inaction.").

4 Significantly, all but one of these decisions were by district judges in the Southern District of New York who are obviously bound by the controlling decisions of the Second Circuit, including the decision below in this case.

these actions or whether the Commodities Exchange Commission properly has primary jurisdiction over these proceedings." 479 F.2d at 531. The opinion contains no discussion of the standard of liability because that issue was not before the court.

As for *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974), it too does not address the bad faith standard; indeed, the phrases "bad faith" or "good faith" do not appear in the opinion. That case, which involved a claim against a *stock* exchange (not a commodities exchange) for failure adequately to supervise a broker who engaged in misconduct, held that where a stock exchange had knowledge or reason to know of a violation by one of its brokers, "a failure to proceed with the requisite due care and conduct would be a dereliction of the duty of self-regulation." 503 F.2d at 368. Unlike the present case, *Sam Wong*, or the other cases applying the bad faith standard, *Hochfelder* did not involve an exchange's duty to regulate trading. It involved only an exchange's duty to supervise its member brokers. For this reason, the delicate balancing approach which the bad faith standard implements for exchange market regulation was not required. In this case, like *Sam Wong*, a bad faith standard is required in order to permit that important balance. As the Second Circuit noted in *Sam Wong*:

> "[The bad faith standard] takes into account the competing needs of exchanges and their officials and of the trading public. Although governors must be able to police the markets effectively with the broad discretion accorded by Congress, traders must not be deprived of their right to challenge illegitimate regulatory action. The Commodity Exchange Act, which embodies the statutory model of exchange self-regulation, mandates that we strike a balance that does not insulate exchange officials from answering serious questions posed by injured traders. To do otherwise would drastically curtail the private right of action deemed essential to the regulatory framework established by Congress. Therefore, when self-interest or

other ulterior motive unrelated to proper regulatory concerns is alleged to constitute the sole or the dominant reason for the exchange action, a complaint is sufficient even though the action was not beyond the bounds of reason. On the other hand, if the governors sincerely and rationally believe their action is in the public interest, there should not be liability simply because the action has the incidental effect of advancing their private interest or damaging someone whom they do not like." 735 F.2d at 677.[5]

The fact that there is no conflict between the Seventh Circuit and the Second Circuit as to the bad faith standard is conclusively demonstrated by the Seventh Circuit decisions which have applied that standard. In *Lagorio* v. *Board of Trade*, 529 F.2d 1290, 1291-92 (7th Cir.), *cert. denied*, 426 U.S. 950 (1976), the Seventh Circuit affirmed summary judgment in favor of a

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5 Apex relies on an *amicus* brief filed by the CFTC in a different appeal. (Pet. at n. 11.) That case involved a claim of exchange responsibility for an elaborate scheme to defraud investors which was perpetrated by one of its members—the identical situation as in *Hochfelder*, *supra*. In that *amicus* brief, the Commission principally argued that the knowledge requirement set forth as the first part of the two-part test of *Ryder Energy* should include constructive as well as actual knowledge. *See* Brief of Commodity Futures Trading Commission, *amicus curiae*, filed August 7, 1987, in Vaccariello v. Financial Partners Brokerage Ltd. (Nos. 86-2918, 2926, 2936, 2937, 3006, 3008, 3064) (7th Cir. consolidated appeals pending). Most significantly, in that brief the Commission acknowledged that the ulterior motive requirement (the second part of the two-step *Ryder Energy* test) "has evolved principally in the context of acts or omissions by exchanges' boards in response to emergency situations" (like the situation here), noting that "the ulterior motive requirement, which focuses on the existence of pecuniary conflicts of interest may be useful in evaluating discretionary emergency actions of exchange governing boards." *Id.* at 17. Indeed, Apex itself concedes that "exchanges must have discretion to respond to manipulation in the manner they judge best. . . ." (Pet. at 18.)

commodities exchange where the court found that the complained-of actions were "taken in good faith by a commodity exchange . . . in the exercise of its regulatory duties." 529 F.2d at 1292. And in the seminal case of *Daniel* v. *Board of Trade*, 164 F.2d 815 (7th Cir. 1947), the Seventh Circuit held that a claim would not lie against a commodity exchange relating to its exercise of emergency powers "in the absence of an averment of bad faith amounting to fraud." 164 F.2d at 819.

**B. The Courts Below Correctly Found No Bad Faith**

Applying the bad faith standard of *Sam Wong* and *Ryder Energy*, the district court and the Second Circuit found that there was no evidence of bad faith by Raber or by the Exchange, and accordingly granted them summary judgment. (Pet. App. at A-35; A-102.) Apex never alleged—and certainly offered no evidence—that Raber or the Exchange had any personal interest in the February heating oil deliveries or any bias toward any participant in the deliveries. Raber and the Exchange acted to address a delivery problem that would not have occurred if Apex had been in a position to deliver—but it was not. (Pet. App. at A-12; A-50.) Raber had no interest in the deliveries, nor could he look forward, as a result of his actions, to any personal gain. (Pet. App. at A-102.) Raber and the Exchange simply did not act with "self-interest or other ulterior motives" as the "sole or dominant reason" for their actions. *Sam Wong*, *supra*. As the district court pointed out, "Apex's true quarrel with the Exchange is that it failed to interpret the rules as Apex would have liked. This does not raise an issue of bad faith." (Pet. App. at A-105.)

Moreover, even if the standard of Exchange liability urged by Apex—requiring mere knowledge plus inaction—were applied, summary judgment was still properly granted. The district court found that there was "insufficient probative evidence either of a conspiracy to manipulate or that the exchange defendants knew of any such conspiracy." (Pet. App.

at A-103.) That finding was affirmed by the Second Circuit. (Pet. App. at A-35.)

In short, the dispute between the parties under the Commodity Exchange Act turns on the application of a universally accepted rule of law to the peculiar facts at issue. No question warranting review by this Court is raised.

## II.

## THE DISMISSAL OF THE ANTITRUST CONSPIRACY CLAIM AGAINST RABER DOES NOT MERIT REVIEW BY THIS COURT

Less than two years ago this Court settled the methodology pertinent to determining a motion for summary judgment in an antitrust conspiracy case. *Matsushita Electrical Industrial Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). Quoting *Monsanto Co.* v. *Spray-Rite Service Co.*, 465 U.S. 752 (1984), the Court set forth the governing standard:

> "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 *must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently*. 465 U.S., at 764, 104 S. Ct., at 1471. Respondents in this case, in other words, *must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents*." 475 U.S. at ____, 106 S.Ct. at 1357, emphasis added.

The courts below, after a thorough review of the record, "concluded that Apex has failed to present evidence linking the Exchange defendants to a conspiracy . . . ." (Pet. App. at A-33.) Apex offers no basis for this Court to exercise its certiorari jurisdiction to review the lower courts' analysis of the facts or their careful application of *Matsushita* to those

facts.[6] Apex's argument as to its second question is nothing more than its disagreement with the lower courts' application of the controlling legal standards to a complex factual situation, which was thoroughly disclosed in the record and fully briefed below. The second question does not present any "special and important reasons" for this Court to exercise its judicial discretion by granting certiorari. Supreme Court Rule 17.1.

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6 Apex argues that because the court of appeals found that there was sufficient evidence to submit to the jury the question of whether there was a conspiracy among three of the long defendants (oil traders who, Apex argued, stood directly to gain from the purported conspiracy—unlike Raber or the Exchange), it need only present "slight evidence" to link any other defendant to the conspiracy. (Pet. at 21.) It supports that argument with a group of cases which were all decided before this Court's *Matsushita* decision. Thus the "slight evidence" cases do not eliminate the *Matsushita* requirement that Apex "must present evidence that tends to exclude the possibility that" Raber acted independently. 475 U.S. at _____, 106 S.Ct. at 1357. The courts below correctly found that there was no such evidence.

Even if a "slight evidence" standard were applicable, there is no reason to grant certiorari, since the court of appeals considered Apex's evidence against Raber in light of that standard and nonetheless found *no* evidence linking Raber to the alleged conspiracy:

> "while we . . . remain aware that ' "once a conspiracy is shown, only slight evidence is needed to link another defendant with it," ' *Wilkinson*, *supra* [United States v. Wilkinson, 754 F.2d 1427, 1436 (2d Cir.), *cert. denied*, 472 U.S. 1019 (1985) (a case relied on by Apex in its Petition (Pet. at 21))], since we do not find such a link, we conclude that affirmance of the grant of summary judgment is appropriate as to the remaining defendants." (Pet. App. at A-28.)

The correctness of the court of appeals' application of the "slight evidence" standard to the facts in this case is surely not a "special and important" issue warranting review by this Court. Supreme Court Rule 17.1.

## CONCLUSION

For all of the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
November 20, 1987

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